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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 1571

BANKERS TRUST COMPANY and LEONARD M. WALLSTEIN, as Executors of the Will of CHARLES NEWMAN, Deceased,

Petitioners,

—vs—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1961

No.

BANKERS TRUST COMPANY and LEONARD M. WALLSTEIN, as Executors of the Will of CHARLES NEWMAN, Deceased,

Petitioners,

—VS—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners (plaintiffs below) respectfully pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit dated March 9, 1961 affirming (a) the summary judgment entered December 30, 1960 by the United States District Court for the Southern District of New York dismissing the complaint on defendant's motion for summary judgment and denying plaintiffs' cross motion for summary judg-

ment, in an action for recovery of estate taxes claimed to have been erroneously collected and (b) the subsequent order of the District Court dated March 27, 1961 denying plaintiffs' motion under Fed. R. Civ. Proc. 60(b) for relief from the judgment of the District Court.

I. The opinion of the Court of Appeals is reported at 299 F. 2d 936 (1962) (Appendix A hereto). The opinion of the District Court, Palmieri, J., granting defendant's motion for summary judgment is reported at 190 F. Supp. 671 (1960) and in this record at 19a-31a;* its opinion denying plaintiffs' motion under Fed. R. Civ. Proc. 60 (b) is reported at 191 F. Supp. 792 (1961) and in this record at 46a-50a. Since the Court of Appeals affirmed on the opinions of the District Court, the latter are sometimes hereinafter referred to as the opinions of the Court of Appeals.

II. The judgment sought to be reviewed was dated and entered March 9, 1962.

III. The statutory provision which confers jurisdiction on this Court is 28 U. S. C. § 1254 (1).

IV. The questions presented for review are:

(a) Whether under the Internal Revenue Code of 1939, § 812(d) and Treas. Regs. 105, § 81.46(a), a bequest to charity is deductible for estate tax purposes, where such bequest is contingent upon failure of surviving issue to a woman whose chance of having living issue is statistically established at not more than from 46/1000th of 1% down to 26/1000th of 1%; or

(b) Whether such a bequest is deductible only upon a demonstration of *certainty* that the charity will

* Numerals followed by "a" refer to pages of the record.

take by proof that it is physically impossible for such woman to have issue by reason of surgery or disease.

V. The case involves the following statute:

Internal Revenue Code of 1939:

Sec. 812. NET ESTATE.

"For the purpose of the tax the value of the net estate shall be determined . . . by deducting from the value of the gross estate—

* * * * *

"(d) Transfers for Public, Charitable, and Religious Uses.—The amount of all bequests, legacies, devises, or transfers . . . to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . ."

The Treasury Regulation involved is Regs. 105 as follows:

"§ 81.46(a) (1942). Conditional bequests. (a) If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable."

Also involved is Revenue Ruling 59-143 (I.R.B. 1959-17, p. 13), which is as follows:

> REVENUE RULING 59—143, I.R.B. 1959—17, p. 13.
>
> Advice has been requested whether a deduction is allowable under section 2055 of the Internal Revenue Code of 1954 for a charitable bequest contingent upon the failure of issue by decedent's daughters whose ages were 55 and 59 years, respectively, at the time of the decedent's death.
>
> A decedent, under the terms of her will, set up a trust in which the income is payable equally to her two daughters during their respective lives. Upon the death of the survivor the corpus of the trust is to be paid to the daughters' bodily issue then living. If there are no issue living at the death of the surviving daughter, the corpus is to be paid to *M* Association, a charitable corporation. At the time of decedent's death, one daughter was 59 years old and unmarried. The other daughter was 55 years old and married. Neither daughter had ever had any children.
>
> Section 2055 of the Code allows a deduction from the gross estate for Federal estate tax purposes of the amount of bequests to a charitable organization. Section 20.2055-2 (b) of the Estate Tax Regulations provide in part that the charitable deduction will be disallowed if, as of the date of decedent's death, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it may become effective, unless the possibility that the charitable transfer will not become effective is so remote as to be negligible.
>
> For tax purposes the common law presumption that a woman can have children is rebuttable. See *United*

States v. Provident Trust Co., 291 U. S. 272. *According to the most recent United States Vital Statistics and Census data, the statistical probability that a woman aged 55 years and older will ever have bodily issue is remote.* In a case similar to that presented here, it was stated that the chances that a woman of 59 (who had never had issue) will have children are negligible and an "impossible contingency." See *City Bank Farmers Trust Co. v. United States*, 74 Fed. (2d) 692.

In view of the foregoing, it is held that the *statistical* probability of children being born to a woman, aged 55 years or older, is so remote as to be negligible. Accordingly, a deduction for the value of the remainder interest bequeathed to charity by the decedent is allowable under section 2055 of the Code. (Emphasis supplied).

VI. The basis for jurisdiction of the District Court is 28 U. S. C. § 1346(a)(1).

VII. The facts material to the consideration of the questions presented are as follows:

The testator, Charles Newman, bequeathed $46,000 to trustees under a revocable *inter vivos* trust, the same to be added to the corpus of that trust. Under that trust income was payable to decedent during his life and, after his death, to Mrs. Anne Marie Hughes during her life. On her death the principal was to be distributed to her issue who survived her and: "In default of issue of said Anne Marie Hughes then surviving," the principal was to be paid to a charitable corporation, bequests to which were deductible in determining Federal estate tax.

At testator's death the principal of the *inter vivos* trust was $37,116.46, to which the abovementioned bequest of $46,000 was added. Because the trust was revocable and because the settlor was the primary life beneficiary, the aggregate value of the original corpus and the bequest ($83,114.36) was included in the gross estate in the executors' estate tax return. However, since Mrs. Hughes had no issue at the testator's death and the testator's executors were advised that there was only an infinitesimal chance that she would thereafter have issue, they claimed a deduction, computed upon prescribed mortality tables applicable to Mrs. Hughes' life expectancy, in the amount of the present value of the remainder to charity. The Commissioner disallowed the deduction and estate tax (in the sum of $15,107.21) was exacted on the full amount of the conditional bequest to charity. Taxpaper duly filed a claim for a refund in that amount, which was rejected and thereupon this action was brought.

Further *undisputed* facts are the following:

At the date of testator's death, Mrs. Hughes was over 47 years of age, had been married for 17 years and had had no issue and to this date has had none (4a).

Applying established actuarial and statistical principles to official U. S. Census and Vital Statistics Reports, it is established that the possibility that such a woman as Mrs. Hughes, aged 47, married, with husband present, would ever bear a first child is not more than 46/1000th of 1%, or 46 chances in 100,000 (12a, 15a).

Furthermore, if Mrs. Hughes, volitionally moved thereunto, attempted immediately after the testator's death to have a child, she would be over 48 years old before the child

would be born. The chance of her then having issue would drop to .00026 or 26 chances in 100,000, or 26/1000ths of 1%. As the years passed the chance would rapidly decrease (38a, 40a). Moreover, the risks to mother and child would be prohibitive (10a, 17a).

All the foregoing results are reached by a method regularly and generally accepted as establishing statistical certainty, relied upon by business and the Government, and used by the Government in the familiar mortality tables upon which it customarily relies. When applied over a long period of years, the results reached show a consistently minute number of first births to women in the age group here involved (43a).

Further, the charitable remainder here would be defeated only if the child of such a birth survived its mother. When the chance of such survival is taken into account, the possibility that the remainder will be defeated is even smaller than the very slight chance of first birth. For all practical purposes, the possibility is reduced to zero (18a).

In the undisputed opinion of one of the world's leading obstetricians and gynecologists, the chance that any childless woman of 47 would have a living first child is *nil* (10a).

Both sides below moved for summary judgment. Petitioners' motion was denied and the Government's motion granted.

Petitioners had argued that remoteness of the possibility of issue could be shown by statistics based on experience and in support of that *principle*, had cited *inter alia*, Rev. Rul. 59-143.

Referring to that Ruling, the District Court stated, in its opinion on the motion for summary judgment, that "Significantly the Department of Commerce statistics (mentioned in the Ruling) showed *no* births to women of 55 years and over" (22a—emphasis supplied). The fact was, however, that, on the contrary, according to the latest available Department of Commerce statistics, there had in fact been births to women of 55 and over. The Revenue Ruling accepted such statistics as establishing the remote possibility of bodily issue and allowed the charity deduction. Presenting those facts, the petitioners moved for relief under F. R. C. P. 60 (b). The motion was denied.

VIII. The reasons for the allowance of the writ are:

A. The specific question of federal law here involved is important and has not been, but should be, settled by this Court.

B. The issue here involved is one of wide public interest. The national public policy is to encourage testamentary gifts to charity by permitting the amount thereof to be deducted from a testator's gross estate, *Edwards* v. *Slocum*, 264 U. S. 61, 63 (1924). The same public policy attaches also to *contingent* gifts to charity where there is a high probability that charity will take. Moreover, the question here would also arise under current law [1954 Code, § 2055 (a) (2); Regs. 20.20 55-2 (b)].

C. The opinions below in several aspects misconceived the meaning of this Court's decision in *Commissioner* v. *Estate of Sternberger*, 348 U. S. 187 (1954), which it found controlling. *Wilkinson* v. *U. S.*, 365 U. S. 399 (1961).

Moreover, in such misconceptions, the court below is in conflict with the Court of Appeals of the First Circuit in *U. S.* v. *Dean*, 249 F. 2d 26 (1955).

(1) The first misconception lies in the view of the courts below that *Sternberger* requires the holding that a charity bequest, contingent upon absence of issue, is not deductible without proof of *certainty* that charity will take based upon proof of *certainty* that there will be no issue.

But *Sternberger* dealt with a bequest to charity conditioned on several events, one of which was that testator's daughter, aged 27, would die without issue. In that relation this Court pointed out: "Respondent concedes that the chance that charity will not take is much more than negligible. Therefore, if § 81.46 (a) applies to the instant case, no charitable deduction is permissible" (348 U. S. at p. 194). The sole question actually litigated was whether *upon that concession*, there was authority under Reg. 105, § 81.44 for fragmenting the bequest to charity and deducting the present value of so much thereof as might go to charity. For reasons not here relevant this Court held in the negative.

In the course of its opinion this Court wrote:

> "The predecessor of § 81.46 confined charitable deductions to outright, unconditional bequests to charity. It expressly excluded deductions for bequests that might never reach charity. . . . Subsequent amendments have clarified and not changed that principle. Section 81.46 (a) today yields to no condition unless the possibility that charity will not take is 'negligible' or 'highly improbable.'" 348 U. S. at p. 194

The passage expressly states that under the earlier regulation charitable deductions were permissible only in cases of outright, *unconditional* bequests to charity. However, it further states that § 81.46 (a) permits such deductions where the bequest is *contingent* but the possibility that charity will not take is negligible or highly improbable.

This passage was quoted in the opinion below (24a) and, we submit, was misunderstood by the courts below.

As to a woman of 27, the effect of the newer regulation was no different from that of the older one. Under both there was no basis for a charity deduction. However, the courts below apparently thought that this Court's statement with reference to a woman of 27, concededly capable of child bearing, was controlling as to the woman here of 47, whose chance of issue was 46/1000th of one percent. Accordingly they deduced from the passage in *Sternberger* the proposition that "the current Regulations do not enlarge to any appreciable extent the situation in which, under the more restrictive language of the earlier Regulations, conditional bequests to charity were permitted" (25a).

The courts below further inferred from the passage in *Sternberger* "the principle of general application that deduction is appropriate when the charity 'is sure to take' but not when the 'condition is such that the charity may not take at all' " (23a), regardless of how remote and negligible the chance thereof may be.

Finally, the courts below denied the deduction for lack of "evidence of poor health or incapacity (to have issue) due to surgery or natural causes" (25a-26a, 46a)—i.e., for lack of proof of the *certainty* of physical impossibility to have issue.

Disregarding the factual basis of the remarks in *Sternberger*, the courts below gave them an all-inclusive application, which is directly negated by the clear language of § 81.46(a). The Treasury has there unequivocally stated that the vesting in charity need not be *sure*, but may be subject to a chance, the happening of which is negligible or highly improbable. The distinction is clear; it is between *absolute certainty* and *high improbability*.

It appears that the opinions below recognized that distinction, but considered themselves bound by the quoted passage in *Sternberger* as they misconceived it. Thus, in footnote 9 (29a), the opinions below cited *City Bank Farmers Trust Co.* v. *U. S.*, 74 F. 2d 692 (2d Cir. 1935) and Rev. Rul. 59-143 as establishing the proposition that the old presumption that all women of whatever age could bear children is rebutted where [the] woman is beyond the age of reasonable *likelihood of child birth*" (emphasis supplied). Such absence of "reasonable likelihood", of course, cannot be determined by speculation or judged *in vacuo*. We shall later show by authority that it can be demonstrated by experience as embodied in Government statistics.

We submit, therefore, that, correctly read, *Sternberger* does not require *certainty* that charity will take, but only a *remote chance* that it will *not* take—a *principle* which the Treasury itself applied in Rev. Rul. 59-143.

(2) The decision of the courts below that, notwithstanding § 81.46 (a), *Sternberger* requires *certainty* is in conflict with the decision of the First Circuit in *U. S.* v. *Dean*, 224 F. 2d 26 (1955). In the opinion there, referring to the very same passage in *Sternberger* quoted by the courts below, the First Circuit wrote:

> "The Government, placing heavy reliance upon certain statements in the opinion of the Supreme Court in the recent case of Commissioner of Internal Revenue v. Sternberger's Estate, * * * contends that the District Court misconstrued § 81.46 of Treasury Regulations 105. Its argument in substance is that § 81.46 as construed by the Supreme Court in the Sternberger case permits a deduction on account of a bequest to charity only when as a practical matter there is no possibility whatever that charity will not eventually take the bequest" (224 F. 2d at p. 27).

The First Circuit then continued:

> "We do not agree for the reason that the pertinent section of the regulations does not say that the deduction must be disallowed unless there is no practical possibility that charity will not take; it says instead that 'no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible,' and we do not think the Supreme Court in Sternberger intended to imply that the section does not mean what it says" (pp. 27-28).

After outlining the question in *Sternberger* and referring to this Court's reversal there, the First Circuit said:

> "In doing so it (the Supreme Court) used some language tending *out of context* to support the government's basic contention. ***But it did not rest its reversal on the broad proposition that charitable bequests which at the decedent's death are not assured*** but are in fact conditional are never deductible" (224 F. 2d, at p. 28, emphasis supplied).

(3) The opinions below further misconceived the decision of this Court in *Sternberger* in their holding that that case compelled the conclusion that the undisputed statistics

here are insufficient to establish the remote possibility of issue to Mrs. Hughes.

At the outset we note that in *Sternberger* the sufficiency of statistics was *not* considered in relation to the probability of issue to the life tenant. That question was there eliminated by the *concession* that such issue was in that case quite likely. The consideration of statistics was solely upon the question of the *valuation* of the portion of the remainder that might nevertheless go to charity. No question of valuation is involved in the instant case. The courts below expressly so stated (21a).

Moreover, in *Sternberger* this Court expressly pointed out (348 U. S. at p. 196) that the bequest to charity was contingent not only on the failure of issue to decedent's 27 year old daughter, but also on whether she would survive her mother and whether, having been divorced at the time of decedent's death, she would remarry, and having remarried, would have issue which would survive her. With that complexity of multifarious contingencies—unlike the simple single contingency here—this Court found statistics useless—just as it did in *Humes* v. *U. S.*, 276 U. S. 487 (1928).

Again, in their rejection of statistics "without more" (26a)—i.e., without evidence of poor health or incapacity due to surgery or natural causes (25a, 46a), the courts below disregarded the Treasury's own enunciation of the *principle* governing the application of § 81.46(a). In Rev. Rul. 59-143 there is not the slightest reference to physical incapacity. The sole basis of the Ruling was the showing of statistics.

Further, in rejecting the test of statistical experience, the courts below ignored the history of §81.46(a). That

section owes its origin to *Ithaca Trust Co.* v. *U. S.*, 279 U. S. 151 (1929) and to *City Bank Farmers Trust Co.* v. *U. S.*, 74 F. 2d 692 (1935). The former permitted the deduction where the vesting in charity was subject to "no uncertainty greater than the general uncertainty that attends human affairs" (at p. 154). The latter approved the determination of the degree of such uncertainty by the use of statistics. Subsequently § 81.46 (a) resolved the conflict between *City Bank* and such cases as *Hoagland* v. *Kavanagh*,* 36 F. Supp. 875, E. D. Mich. (1941) and *Turner* v. *Hassett*, 55 F. Supp. 637, D. C. Mass. (1941), all of which had been decided *before* the promulgation of § 81.46(a) in 1942. Finally Rev. Rul. 59-143 applies the principle of the new Regulation (§ 81.46(a)).

We believe that, viewed in retrospect, § 81.46 (a) is but a further liberalization of earlier doctrine. This Court in *U. S.* v. *Provident Trust Co.*, 291 U. S. 272 (1934) demolished the ancient rule that all women, no matter how old, could bear children. It held that the "practical" inability to do so is a fact that must be recognized, but it did *not* hold, as the opinions below assumed, that physical incapacity was an essential fact (26a, 46a and note 2 to the opinion below denying the motion for relief—49a). § 81.46 (a) went a step further and prescribes that recognition must be given to *any* fact (not only physical disability, as by reason of menopause) which shows the unlikelihood of birth. And, finally, Rev. Rul. 59-143, with no slightest mention of physical incapacity, establishes the principle that the negligible chance of issue may be demonstrated by the statistical result of experience.

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* It is noteworthy that the opinion below conceded that "it may be" that that case (Hoagland) "would bear re-examination in the light of the 'clarifying amendment'" (Fn. 15, 30a).

We believe, further, that it was only the misconception of *Sternberger* which could have led to the statements in the opinion here that "It is impossible to calculate with *certainty* the extent of that limited chance (of issue)" (emphasis supplied) and that "Where, as here, there has been no evidence of poor health or incapacity due to surgery or natural causes—statistical data is insufficient to meet the requirements of § 81.46 (a)" (25a).

(4) In the misconception of *Sternberger* as rejecting statistics to measure the possibility of issue, the courts below were again in conflict with the First Circuit. That court recognized the truth of the axiom that the best way to estimate future probability is by past experience. In *United States* v. *Dean*, 224 F. 2d, at p. 29, that court wrote:

> "• • • the chance that charity will take can be accurately computed by the application of recognized principles of the actuarial art to generally accepted statistical data."

Dean, moreover, expressly rejected the view here below that *Sternberger* adjudicated the unavailability of statistics to measure probability. Referring to the aforementioned complexity of the contingency in *Sternberger*, the First Circuit noted that the remarks of this Court with reference to statistics were based "on the ground that the actuarial art was unable to cope with the *contingency of that particular case*" (224 F. 2d, at p. 28, emphasis supplied).

(5) A further misconception of *Sternberger* by the courts below was with reference to the asserted distorting effect of volition to have issue. By concession, the 27 year old

daughter could be expected safely to have issue. Here, in contrast, the uncontradicted statistical and medical evidence shows that Mrs. Hughes, at her age, no matter what the inducement or her volition, would have only an infinitesimal chance of having issue and that the attempt so to do would probably be fatal both to mother and child (10a, 17a). That undisputed feature of this case the courts below disregarded, again in conflict with *Dean*, where the First Circuit wrote:

> "In this case the chance that charity will benefit depends entirely upon the relative longevity of three persons, a matter unaffected by volition or personal inducement, for it would be preposterous to assume that either the daughter or the daughter-in-law or both, would choose to commit suicide in order to defeat the decedent's bequest to charity" (224 Fed. 2d at p. 28).

The possibly distorting effect of volition in a particular case depends upon the freedom in such case to exercise it. There was such freedom in *Sternberger;* here there was not.

Further, we submit that any element of volition to have issue is reflected in the codification of experience shown by the statistics of birth published by the United States Government. Certainly it cannot be assumed that it was accident only or contrary volition which was reflected in the statistics there shown.

(6) Finally, the courts below gave unwarranted heed to the administrative decision herein (25a, 48a). The First Circuit in *Dean* held that after determination of the actu-

arial chance that charity would not take, the question whether that chance is negligible or highly improbable must be determined in each case as a matter of law (224 F. 2d, at p. 29).

Moreover, the administrative disposition in a particular case certainly may not disregard a Treasury Regulation [§ 81.46(a)] especially where the principle to be applied in the administration of that regulation has been fixed by a Treasury Department Ruling (59-143) of general application.

Again, even if an administrative disposition in a given case is entitled to weight where it appears reasonable, it has no such weight where it holds that a chance of 46/1000 of 1% down to 26/1000 of 1% does not show that such chance is so remote as to be negligible.

Conclusion

Though we are fully aware of this Court's infrequent grant of the writ, we respectfully submit that for all the foregoing reasons the petition for a writ of certiorari should here be granted. In *Sternberger* the writ was granted because of a conflict between the First and Second Circuits on one aspect of the meaning and effect of § 81.46. So here, we submit, the misconceptions of *Sternberger* by the courts below and the conflict between their views and those of the First Circuit on another aspect of the same § 81.46 demonstrate that the writ should be granted. In both aspects the final determination of the questions involved are in highest degree necessary to the general pub-

lic interest and to the uniform administration of the Revenue Laws.

New York, N. Y.
May 28, 1962

Respectfully submitted,

LEONARD M. WALLSTEIN, JR.
Attorney for Petitioners

LEONARD M. WALLSTEIN
BENJAMIN MENSCHEL
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 260—September Term, 1961.

(Argued March 9, 1962 Decided March 9, 1962.)

Docket No. 26899

BANKERS TRUST COMPANY and LEONARD M. WALLSTEIN, as Executors of the Will of Charles Newman, Deceased,

Plaintiffs-Appellants,

—v—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

WATERMAN, KAUFMAN and MARSHALL,

Circuit Judges.

The executors of the estate of Charles Newman seek reversal of a judgment dismissing their complaint wherein they seek recovery of estate taxes allegedly erroneously paid.

Affirmed on the opinion below, United States District Court for the Southern District of New York, Palmieri, J.,

reported at 190 F. Supp. 671; (1960). An order denying a motion under Fed. R. Civ. P. 60(b) for relief from the judgment is also affirmed on the opinion of Judge Palmieri, reported at 191 F. Supp. 792 (SDNY 1961).

WALLSTEIN, MENSCHEL & WALLSTEIN (Leonard Wallstein, Jr., of counsel), New York City, for Plaintiffs-Appellants.

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York (Robert Arum, Vincent L. Broderick, David Klingsberg, Asst. United States Attorneys, of counsel), for Defendant-Appellee.

PER CURIAM:

Plaintiffs, as executors of the Estate of Charles Newman, appeal from a summary judgment granted by the court below, dismissing plaintiffs' complaint in an action for the recovery of estate taxes claimed to have been erroneously collected, and also appeal from a subsequent order of the same court denying plaintiffs' motion under Fed. R. Civ. Proc. 60(b) for relief from that judgment.

The district court judgment and the subsequent order denying relief therefrom are affirmed on the studiously reasoned opinions of Judge Palmieri below, 190 F. Supp. 671 (SDNY 1960), and 191 F. Supp. 792 (SDNY 1961).